



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2001 Assembly Bill 60	Senate Substitute Amendment 2
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INTRODUCTION

Assembly Bill 60 was recommended for passage by the Assembly Committee on Judiciary, by a vote of Ayes, 8; Noes, 0, on March 14, 2001. On March 20, the Assembly passed the proposal by a vote of Ayes, 97; Noes, 0, after adopting Assembly Amendment 1, Assembly Amendment 1 to Assembly Amendment 2, and Assembly Amendment 2. The Senate Committee on Judiciary, Consumer Affairs and Campaign Finance Reform recommended concurrence in the proposal, as amended by Senate Amendment 1, on June 26, 2001, by a vote of Ayes, 5, Noes, 0.

Following the above-described legislative action on Assembly Bill 60, the Biennial Budget Act, 2001 Wisconsin Act 16, was enacted. The Budget Act contains provisions addressing the same subject matter as Assembly Bill 60. See SECTIONS 3952 to 3959 and 9359 of Act 16. Senate Substitute Amendment 2 to Assembly Bill 60 treats the pertinent budget act provisions to conform to the organization and language of the bill. The substitute amendment also retains provisions of the bill, not included in Act 16, that were included in the amended version of the bill recommended by the Senate Committee on Judiciary, Consumer Affairs and Campaign Finance Reform.

Senate Substitute Amendment 2, introduced by Senator Plache, was adopted by the Senate on a voice vote on October 4. The Senate concurred in the proposal, as amended, on a voice vote.

BACKGROUND

Under current s. 944.205 (2) (a), Stats., a person is guilty of a Class E felony if the person:

Takes a photograph or makes a motion picture, videotape or other visual representation or reproduction that depicts nudity without the knowledge and consent of the person who is depicted nude, if the person knows or has reason to know that the person who is depicted nude does not know of and

consent to the taking or making of the photograph, motion picture, videotape or other visual representation or reproduction.

Last year, the Wisconsin Supreme Court held that s. 944.205 (2) (a), Stats., is unconstitutionally overbroad because it includes within its coverage visual representations, both originals and reproductions, protected by the First Amendment. [*State v. Stevenson*, 236 Wis. 2d 86 (2000).] *Stevenson* was convicted of making a videotape depicting a person in a state of nudity without that person's consent in violation of s. 944.205 (2) (a), Stats. *Stevenson* conceded that the conduct for which he was convicted may be regulated by the state but contended that the statute under which he was convicted was overbroad and unconstitutional on its face under the First Amendment.

In holding the statute overbroad, the Wisconsin Supreme Court noted that the statute not only properly prohibits surreptitious videotaping of persons in the nude, but also improperly prohibits all visual expression of nudity without explicit consent, including political satire, art, and newsworthy images. The state argued that the statute is essentially an invasion of privacy statute directed at surreptitious videotaping or visual representation of a person without consent while the person has a reasonable expectation of privacy. However, the court declined to interpret the statute in that fashion and consequently ruled the statute overbroad.

Assembly Bill 60 and Related Budget Provisions

Both Assembly Bill 60 and the budget act provisions were introduced in response to *Stevenson*. While the two proposals differ considerably in language and structure they appear to accomplish the same results, with one exception.

Generally, both proposals **narrow** the scope of s. 944.205, Stats., in order to avoid including constitutionally protected representations, by:

1. Adding to the prohibition against making an original visual representation depicting nudity the element that the representation is made or taken while the subject of the representation is nude in circumstances in which he or she has a reasonable expectation of privacy; and
2. Applying the prohibitions against reproducing, possessing, or distributing visual representations only if the person knows or should know that the original was made or taken in violation of the statute and if the subject of the reproduction does not consent to the reproduction, possession, or distribution.

Generally, both proposals **expand** the coverage of s. 944.205, Stats., by:

1. Including within the categories of representations covered by the prohibitions in the proposal "data representations of visual images" or "the storage of data representing an image," such as computer programs and stored digital images.
2. Adding the "exhibition" of visual representations depicting nudity to the prohibited conduct.

There is one substantive difference between the proposals. Assembly Bill 60, both as amended by the Assembly and Senate Substitute Amendment 2, makes a violation of the criminal prohibitions of the bill an invasion of privacy under the statutory civil cause of action for invasion of privacy (see s.

895.50, Stats.), regardless of whether there has been a criminal action and regardless of the outcome of any criminal action. Act 16 does not contain this provision.*

In addition, concern has been expressed with the definition of “recording” in Act 16. Because of the different organization and wording of Assembly Bill 60, that definition is not used in the bill (see the description of the substitute amendment, below).

Senate Substitute Amendment 2

Substitute Amendment 2:

1. Treats the provisions of Act 16 that affect s. 944.205, Stats., by renumbering the section as s. 942.09 (to include the provision in the chapter which relates, among other things, to crimes against privacy) and by conforming the organization and language of the section to the provisions of Assembly Bill 60, as amended by the Assembly. The Act 16 provisions are made consistent with Assembly Bill 60 primarily to deal with the issue of the definition of “recording” under Act 16.

Act 16, SECTION 3955, defines “recording” in s. 944.205 by cross-referencing the definition in s. 948.01 (3r), created by SECTION 3958 of Act 16. That definition provides: “‘Recording’ includes the creation of a reproduction of an image or a sound or the storage of data representing an image or a sound.” While under standard drafting technique, use of “includes” in a definition rather than “means” is intended to be noninclusive rather than inclusive, apparently some prosecutors are concerned that a defendant might claim that because of the way “recording” is defined and used in Act 16, only a reproduction depicting nudity is covered by the prohibition, and not the original image. Therefore, the substitute amendment repeals the definition of recording, substitutes definitions of “representation” and “captures a representation,” and specifically prohibits making a reproduction of a prohibited representation.

2. Consistent with the action of the Assembly and the recommendation of the Senate Judiciary Committee, makes a violation of the criminal prohibition against representations depicting nudity an invasion of privacy under the statutory civil cause of action for invasion of privacy.

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* Assembly Amendment 2 to Assembly Bill 60 also provided: (a) that punitive damages may be awarded to a plaintiff in a civil action for invasion of privacy when the invasion is based on a violation of the criminal prohibitions of the bill; and (b) that punitive damages in these cases may be awarded regardless of whether the plaintiff proves compensatory damages resulting from the invasion of privacy. Senate Amendment 1, recommended by the Senate Committee on Judiciary, Consumer Affairs and Campaign Finance Reform, removes the punitive damages provisions of the bill. The substitute amendment does not include the punitive damages provisions.